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REFORMING CIVIL FORFEITURE LAW: THE CASE FOR AN AUTOMATIC STAY PROVISION

GARY R. BROWN*

INTRODUCTION

Driven primarily by the war on drugs, the federal government has broadly expanded the use of civil forfeiture statutes in recent years.¹ Since 1985, more than \$2.7 billion has been forfeited to the United States, and an additional \$1.1 billion has been distributed to more than 3000 state and local law enforcement agencies through the federal government's equitable sharing program.² According to Department of Justice statistics, more than 5000 civil forfeiture actions were pending in federal district courts in 1993.³

Despite certain criticism of the growth of civil forfeiture actions by courts, commentators, and the media,⁴ the trend towards increased use of civil forfeiture actions is likely to continue. The

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¹ *United States v. All Funds on Deposit*, 801 F. Supp. 984, 989 (E.D.N.Y. 1992) ("As the 'drug war' has escalated, the number of forfeiture cases in the United States has burgeoned."), *aff'd sub nom.* *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993).

² Department of Justice press release, January 15, 1993; Cary H. Copeland, *Seizing Assets: Effective Anti-Crime Tool*, CHI. TRIB., Apr. 1, 1992, at 22.

³ See Civil Caseload Statistics of Asset Forfeitures by District, Aug. 31, 1993.

⁴ See, e.g., *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 515 (1993) (Thomas, J., dissenting) (expressing "distrust of the Government's aggressive use of broad civil forfeiture statutes"); *United States v. Statewide Auto Parts*, 971 F.2d 896, 905 (2d Cir. 1992); *Onwubiko v. United States*, 969 F.2d 1392 (2d Cir. 1992); George C. Pratt & William B. Petersen, *Civil Forfeiture in the Second Circuit*, 65 St.

potential of civil forfeiture to raise revenue offers a strong incentive to a deficit-laden government.⁵ Moreover, amendments to the federal money laundering statutes have substantially broadened the application of civil forfeiture to various financial crimes. Through the incorporation of sections 1956 and 1957 into section 981 of title 18 of the United States Code, the government can bring forfeiture proceedings to recover property involved in transactions or attempted transactions related to a broad array of financial crimes, including all of the RICO predicates.⁶ The Annunzio-Wylie Anti-Money Laundering Act of 1992⁷ added several new domestic offenses to this list of forfeitable offenses,⁸ included certain foreign offenses,⁹ relaxed the "tracing" requirements imposed on the government,¹⁰ and expanded the jurisdictional and venue provisions of section 981.¹¹ Perhaps most significant was the enactment of title 18, section 984, which permits, for the first time, civil forfeiture of substitute assets under certain conditions.¹² Fi-

JOHN'S L. REV. 653, 671-72 (1991); A.S. Hays, *Civil Forfeiture Laws are Under Attack*, WALL ST. J., Jan. 14, 1993, at B8.

⁵ See *James Daniel Good*, 114 S. Ct. at 502 n.2; *Caplin & Drysdale v. United States*, 491 U.S. 617, 629 (1989) ("[S]ums of money that can be raised for law enforcement activities [through forfeiture] are substantial . . . and the government's interest in using the profits of crime to fund these activities should not be discounted."); *State-wide*, 971 F.2d at 909 (Van Graafeiland, C.J., dissenting) (stating that raising revenue to fund law enforcement activities is positive aspect of forfeiture); *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 35-36 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992).

⁶ 18 U.S.C. § 981(a)(1)(A) (1988). The following property is subject to forfeiture to the United States: "Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324(a) of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property." *Id.* Section 1956 prohibits participation in a transaction involving the proceeds of "specified unlawful activity." *Id.* § 1956(a). The predicate "unlawful activity" encompasses, *inter alia*, RICO offenses, *id.* § 1956(c)(7)(A), as well as various financial crimes. *Id.* § 1956(c)(7)(D) (including fraudulent bank entries, fraudulent Federal Deposit Insurance transactions, fraudulent loan applications, etc.).

⁷ Pub. L. No. 102-550, 106 Stat. 4056 (1992).

⁸ *Id.* § 1534 (amending 18 U.S.C. § 1956(c)(7)(D)).

⁹ *Id.* § 1536 (amending 18 U.S.C. § 1956(c)(7)(B)).

¹⁰ *Id.* § 1522 (to be codified at 18 U.S.C. § 984); see *infra* note 12 and accompanying text (discussing forfeiture of substitute assets).

¹¹ Pub. L. No. 102-550, § 1521, 106 Stat. 4044, 4062 (amending 28 U.S.C. § 1355).

¹² See Amy G. Rudnick & James M. Schwarz, *Banks Must Gear Up for Comprehensive New Money Laundering Law*, 11 BANKING POL'Y REP. 1 (1992), available in WESTLAW, PH-BNKPR Database.

The law contains a significant new civil forfeiture section that permits the government to seize and forfeit identical or "substitute" assets in cases involving fungible property. This new provision (18 U.S.C. § 984) is intended to ease the government's tracing requirements in civil forfeiture cases in-

nally, abandoning traditional limitations on a court's forfeiture authority, Congress expanded the in rem jurisdiction of the district courts to encompass property located anywhere in the world.¹³

Thus, any comprehensive reform of federal civil litigation must address civil forfeiture actions, which constitute one of the fastest growing segments of the federal dockets. This Article analyzes one provision by which to reduce the burden caused by civil forfeiture actions: the imposition of an automatic stay of such actions pending the resolution of related or parallel criminal proceedings. As discussed below, an automatic stay provision would conserve judicial resources; safeguard criminal investigations, prosecutions, and grand jury proceedings; and protect the Fifth Amendment rights of claimants in civil forfeiture proceedings.

I. CURRENT PROVISIONS FOR STAYING CIVIL FORFEITURE ACTIONS

Under current law, the government must move for a stay and must carry the burden of justifying its imposition. Section 981(g) of title 18 of the United States Code provides: "The filing of an indictment or information alleging a violation of law, Federal, State or local, which is also related to a forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the forfeiture proceeding."¹⁴ Section 881 of title 21, the civil forfeiture section governing actions based on narcotics violations, contains virtually identical language.¹⁵ Based on the showing of good cause required by these sections, courts have imposed varying burdens upon the government in considering whether to grant a stay. For example, a number of courts have analogized the motion for a stay to an application for a preliminary injunction, and have thus held that the government must demonstrate:

volving the laundering of cash, monetary instruments in bearer form, funds deposited in bank accounts and other fungible property. The forfeiture of substitute assets has been permitted in criminal money laundering cases since 1988.

Id. For examples of criminal substitute assets forfeiture provisions, see 18 U.S.C. § 1963(m) (1988) (RICO); 21 U.S.C. § 853(p) (1988) (drug enforcement).

¹³ See 28 U.S.C. § 1355(b).

¹⁴ 18 U.S.C. § 981(g) (1988).

¹⁵ See 21 U.S.C. § 881(i) (1988).

(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the [stay] is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the [stay] may do to [the claimant], (4) that granting the [stay] will not disserve the public interest.¹⁶

Other courts have stated that "the government should at least be required to make a specific showing of the harm it will suffer without a stay and why other methods of protecting its interests are insufficient."¹⁷ Furthermore, courts have held that the potential abuse of civil discovery does not justify a stay under these provisions. Rather, a motion for a stay must be made in response to abusive discovery requests.¹⁸ Courts have also grappled with the issue of whether the parallel criminal case is sufficiently related to the civil forfeiture action to justify a stay.¹⁹

These statutory provisions were intended to facilitate the issuance of stays. In enacting these sections, "Congress anticipated that compelling discovery in the context of a civil forfeiture proceeding might force the Government to prematurely disclose information in the related criminal proceeding that it would not otherwise have to do."²⁰ Thus, it was the intent of Congress that these sections would protect the government by facilitating the entry of stays in civil forfeiture cases.²¹

¹⁶ See, e.g., *Canal Auth. v. Calloway*, 489 F.2d 567, 572 (5th Cir. 1974); *United States v. 5137/5139 Cent. Ave.*, 776 F. Supp. 1090, 1092 (W.D.N.C. 1991); *United States v. \$151,388.00 in United States Currency*, 751 F. Supp. 547 (E.D.N.C. 1990); *United States v. 12525 Palm Rd.*, 731 F. Supp. 1057, 1060 (S.D. Fla. 1990); *United States v. 1303 Whitehead St.*, 729 F. Supp. 98, 100 (S.D. Fla. 1990).

¹⁷ *In re Ramu Corp.*, 903 F.2d 312, 320 (5th Cir. 1990); accord *United States v. 118 Ave. D*, 754 F. Supp. 282, 287 (E.D.N.Y. 1990).

¹⁸ *Ramu*, 903 F.2d at 318; *United States v. All Funds on Deposit*, 767 F. Supp. 36 (E.D.N.Y. 1991) (denying stay); *118 Ave. D*, 754 F. Supp. at 282. But see *United States v. 297 Hawley St.*, 727 F. Supp. 90, 91 (W.D.N.Y. 1990) (granting stay based on potential for abuse of civil discovery).

¹⁹ See, e.g., *United States v. Funds Held in Name of John Hugh Wetterer*, 138 F.R.D. 356 (E.D.N.Y. 1991) (holding that interests of corporate claimant and indicted director sufficiently aligned to justify stay); *118 Ave. D*, 754 F. Supp. at 289 ("[C]onsiderations supporting a stay remain the same where the [non-defendant] claimant is a relative or associate of the criminal defendant").

²⁰ *118 Ave. D*, 754 F. Supp. at 285-86 (citing S. REP. NO. 225, 98th Cong., 2d Sess. 215, reprinted in 1984 U.S.C.A.N. 3182, 3398-99) (Section 881(i) "provides for a stay of civil forfeiture proceedings when the government has commenced a criminal case that involves issues the same as or related to those on which the forfeiture action is based").

²¹ See *297 Hawley St.*, 727 F. Supp. at 91-92.

Ironically, the Fifth Circuit has held that rather than expanding the circumstances under which a stay could be granted, section 881(i) of title 21 has "explicitly circumscribed" the "inherent discretion of the trial court to control the course of litigation."²² In the absence of this provision, the Fifth Circuit reasoned, a court has the discretion to enter a stay "in control of its docket and in the interest of justice."²³ The court found that, "before granting a stay under 21 U.S.C. § 881(i), a district court must make express findings of fact and conclusions of law concerning the existence of the statutory prerequisites for a stay," namely relatedness and good cause.²⁴ Therefore, according to the Fifth Circuit, the application of the "stay" provisions is inconsistent with the legislative purpose of facilitating the entry of a stay in civil forfeiture actions.

Both title 18, section 981(g) and title 21, section 881(i) require the filing of an indictment or information as a predicate to staying civil forfeiture proceedings.²⁵ Absent an indictment or information, a stay of discovery may be obtained in the form of a protective order pursuant to Rule 26 of the Federal Rules of Civil Procedure.²⁶ Courts have long recognized that when criminal and civil proceedings arise from the same set of facts, the government is generally entitled to a protective order against civil discovery pending resolution of the criminal action.²⁷ However, to obtain a stay under Rule 26, the government must make the same "good cause" showing required by the statutory provisions.²⁸ Moreover, under certain circumstances, a stay of discovery, unlike the stay of proceedings provided by the statutory sections, is insufficient to protect the government's interests. For example, to adequately defend against a summary judgment motion, the government may be required to disclose information which could compromise an ongoing investigation or pending prosecution.²⁹ Similarly, a mo-

²² *Ramu*, 903 F.2d at 318-19.

²³ *Id.* at 318 (quoting *McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982)).

²⁴ *Id.* at 319 (remanding matter to district court for determination of relatedness and good cause).

²⁵ See *supra* notes 15-16 and accompanying text (setting forth language of stay provisions).

²⁶ FED. R. CIV. P. 26(c).

²⁷ See *United States v. 1964 Cadillac Coupe DeVille*, 41 F.R.D. 352, 353 (S.D.N.Y. 1966).

²⁸ *United States v. 12525 Palm Rd.*, 731 F. Supp. 1037, 1059 (S.D. Fla. 1990).

²⁹ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (finding that party opposing summary judgment must come forward with its case).

tion to stay pending civil forfeiture proceedings requires the disclosure of sensitive information.³⁰

II. BENEFITS OF AN AUTOMATIC STAY PROVISION

Revising the current framework to provide for an automatic stay would result in increased judicial efficiency and offer protection to the government, as well as to civil forfeiture claimants. The benefits offered to litigants by such a revision would, in the long run, exceed the perceived tactical advantages of the present system.³¹

A. *Judicial Economy*

In terms of judicial economy, an automatic stay provision would facilitate the resolution of civil forfeiture actions in two ways. First, an automatic stay would eliminate the burdensome motion practice associated with obtaining a stay, which frequently occurs in civil forfeiture actions. Although many courts currently apply a preliminary injunction-like standard in determining whether to grant a stay, they have struggled with the concepts of good cause and relatedness under the relevant statutory provisions. The introduction of an automatic stay of civil forfeiture actions would eliminate the need for these nettlesome determinations.

Second, and perhaps more importantly, staying civil forfeiture proceedings pending the outcome of parallel criminal proceedings will substantially reduce the judicial resources required to ultimately resolve the merits of the forfeiture cases. Under existing law, verdicts rendered in criminal proceedings have a collateral estoppel effect on parallel civil forfeiture proceedings.³² A similar effect is attributed to guilty pleas entered in criminal proceedings.³³ A conviction in a state criminal proceeding has a

³⁰ See, e.g., *12525 Palm Road*, 731 F. Supp. at 1060 (authorizing *in camera* review of materials in support of motion to stay).

³¹ See REPORT TO THE HOUSE OF DELEGATES 108B, 4 (A.B.A. Criminal Justice Section 1993) ("Inevitably, in parallel proceedings, both sides are tempted to utilize civil discovery as a means of circumventing the limitations imposed under the criminal discovery rules.") [hereinafter ABA Report].

³² *United States v. 127.814 Acres of Land*, 941 F.2d 1210 (6th Cir. 1991); *United States v. \$80,080.00 in United States Currency*, 779 F. Supp. 169 (N.D. Ga. 1991).

³³ *United States v. 10652 South Laramie*, 774 F. Supp. 518 (N.D. Ill. 1991). *But see United States v. Via and One 1982 Cadillac Eldorado*, 9 F.3d 1545 (4th Cir. 1992).

preclusive effect on federal civil forfeiture proceedings.³⁴ While collateral estoppel generally applies only to the individuals subject to the conviction, it may, under certain circumstances, bar the claims of claimants other than the criminal defendant.³⁵ Thus, awaiting the outcome of parallel criminal proceedings will, in many cases, serve to resolve the underlying merits of civil forfeiture actions, making such actions subject to summary judgment or rapid settlement. Even in those cases in which a trial is still required, the collateral effect of parallel criminal cases may substantially reduce the issues to be tried. Conversely, although an acquittal in a criminal case does not have a preclusive effect on parallel civil forfeiture actions,³⁶ an acquittal may reveal potential weaknesses in the government's case, possibly leading to a voluntary dismissal or settlement. Although "Congress seems to have intended that the civil and criminal proceedings advance along parallel tracks with neither one slowing or inhibiting the other,"³⁷ considerations of judicial economy suggest that this policy be carefully reconsidered.

B. Benefits to the Government

It is well established that the government has an interest in protecting criminal prosecutions from civil discovery. In contrast to the broad scope of discovery permitted under the Federal Rules of Civil Procedure, the discovery available to a criminal defendant is narrowly circumscribed. For example, title 18, section 3500 "does away with any pre-trial discovery of statements of a government witness" in a criminal trial.³⁸ Courts have expressed concern that information obtained by or on behalf of criminal defendants in civil discovery could result in perjury or manufactured

³⁴ *United States v. 303 W. 116th St.*, 901 F.2d 288 (2d Cir. 1990); *United States v. 200 Pennsylvania Ave.*, 786 F. Supp. 400 (D. Del. 1992); *United States v. 16 Sequoia*, 764 F. Supp. 1285 (N.D. Ill. 1991); *United States v. 250 Kreag Rd.*, 739 F. Supp. 120 (W.D.N.Y. 1990).

³⁵ *See, e.g., United States v. 1984 Jaguar XJ16*, No. 90-28-ALB (M.D. Ga. Oct. 31, 1991); *cf. United States v. Accounts Nos. 3034504054 and 144-07-143*, 971 F.2d 974, 985-87 (3d Cir. 1992) (striking claim of corporate claimants based on fugitive status of principal).

³⁶ *United States v. Assortment of 89 Firearms*, 465 U.S. 354, 359 (1984). "That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled." *Id.* (citation omitted).

³⁷ *United States v. 121 Nostrand Ave.*, 760 F. Supp. 1015, 1020 (E.D.N.Y. 1991).

³⁸ *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

evidence, intimidation of government witnesses, and unfair surprise to the prosecution,³⁹ while invocation of the Fifth Amendment could effectively thwart any attempt by the government to obtain relevant evidence.⁴⁰

In addition, the government has a substantial interest in securing the secrecy of criminal investigations and grand jury proceedings. In fact, it can be argued that there is a greater risk of compromising a criminal prosecution at the investigative stage than after an indictment or information has been filed.⁴¹ An automatic stay would protect the public interest in safeguarding criminal investigations and proceedings, and would avoid the unnecessary disclosure of sensitive law enforcement information.

In light of expanding application of constitutional protections to civil forfeiture claimants which transcend the boundaries of the civil proceeding, a stay of civil forfeiture actions may also serve to protect the viability of certain criminal prosecutions. For exam-

³⁹ *United States v. Hugo Key & Son, Inc.*, 672 F. Supp. 656, 658 (D.R.I. 1987). As the *Hugo* court noted, the

liberal discovery rules [of the Federal Rules of Civil Procedure] would expose the strategy of the prosecution and possibly result in defendant's perjury and manufacturing of evidence Moreover, it cannot be doubted that the discovery of the identity of confidential government informants would provide an opportunity for the intimidation of prospective witnesses Finally, the liberal discovery policies of the Federal Rules of Civil Procedure, while permitting defendant broad scope would not be available to the government . . . because defendant could . . . assert his privilege against self-incrimination. This procedural asymmetry would offer the defendant the opportunity to surprise the prosecution at trial while withholding that same opportunity from the prosecution.

Id.; see *Britt v. North Carolina*, 404 U.S. 226, 238 (1971) (Douglas, J., dissenting) (discussing effects of discovery in criminal proceedings); *United States v. LBS Bank-New York*, 757 F. Supp. 496, 507 (E.D. Pa. 1990) (discussing danger of discovery in criminal proceedings); *United States v. Persico*, 621 F. Supp. 842, 868 (S.D.N.Y. 1985) (same); *United States v. Smith*, 209 F. Supp. 907, 911 (E.D. Ill. 1962) (same).

⁴⁰ *Hugo Key & Son*, 672 F. Supp. at 658; *Founding Church of Scientology v. Kelley*, 77 F.R.D. 378, 381 (D.D.C. 1977) (citing *Campbell*, 307 F.2d at 487 n.12); see *United States v. Mellon Bank N.A.*, 545 F.2d 869, 870 (3d Cir. 1976) (stating that intervenor obtained stay of civil action because it may have jeopardized Fifth Amendment rights); *Gordon v. FDIC*, 427 F.2d 578, 580 (D.C. Cir. 1970) (stating that courts properly issue protective orders preventing discovery that would violate privilege against self-incrimination).

⁴¹ *Integrated Generics, Inc. v. Bowen*, 678 F. Supp. 1004, 1009 (E.D.N.Y. 1988) (granting stay to "ensur[e] the integrity of grand jury proceedings"); *Founding Church*, 77 F.R.D. at 380 n.4 ("[T]he policies that necessitate limiting civil discovery when it would interfere with a criminal investigation . . . are equally applicable whether the plaintiff seeking discovery is a defendant or merely the subject of a grand jury investigation."); *SEC v. Control Metals Corp.*, 57 F.R.D. 56 (S.D.N.Y. 1972) (granting stay of discovery pending completion of grand jury proceedings).

ple, courts have held that, at least under certain circumstances, civil forfeiture actions are subject to the Double Jeopardy Clause of the Fifth Amendment.⁴² Thus, while resolution of a criminal action generally preceded that of related civil actions, the government is faced with the possibility that a successful civil forfeiture could preclude a related prosecution.⁴³ Similarly, the Supreme Court's application of the Eighth Amendment's Excessive Fines Clause to civil forfeiture could complicate prosecution or sentencing in a post-forfeiture criminal action.⁴⁴ Thus, an automatic stay of civil forfeiture proceedings furthers the government's interest in ensuring the imposition of appropriate criminal sanctions.

C. *Benefits to the Claimant*

Under the current framework, a stay is generally available only on the government's motion. Motions by claimants to stay civil forfeiture actions have generally been denied.⁴⁵ In responding to civil discovery, claimants are, of course, free to invoke the Fifth Amendment.⁴⁶ The problem confronting claimants, however, is that invocation of the Fifth Amendment results in a negative inference in the civil forfeiture proceeding,⁴⁷ and potentially, forfeiture of their property.

⁴² *United States v. 38 Whalers Cove Drive*, 954 F.2d at 29, 34 (2d Cir. 1991) (citing *United States v. Halper*, 490 U.S. 435 (1989)); cf. *United States v. United States Currency in the Amount of \$145,139.00*, Nos. 965, 92-6252, 1994 WL 56504 (2d Cir. 1994).

⁴³ See *United States v. Amiel*, 995 F.2d 367 (2d Cir. 1993).

⁴⁴ See *Austin v. United States*, 113 S. Ct. 2901 (1993).

⁴⁵ See *United States v. 121 Nostrand Ave.*, 760 F. Supp. 1015, 1034 (E.D.N.Y. 1991) (noting that court initially denied stay); *United States v. 218 Panther St.*, 745 F. Supp. 118, 119 (E.D.N.Y. 1990) (denying stay because claimant lacked standing), *aff'd*, 951 F.2d 461 (2d Cir. 1991); cf. *United States v. 6250 Ledge Rd.*, 943 F.2d 721, 730 (7th Cir. 1991) (holding that claimant must precisely indicate prejudice resulting from civil action to obtain stay).

⁴⁶ See, e.g., *Pillsbury v. Conboy*, 459 U.S. 248, 264 n.24 (1983) (holding that district courts are precluded from "compelling testimony in a civil deposition over a valid assertion of the Fifth Amendment privilege, absent a specific assurance of immunity for such testimony"); *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (holding that Fifth Amendment is most important exception to testimonial duty).

⁴⁷ *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). Generally, "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Id.*; accord *United States v. 15 Black Ledge Drive*, 897 F.2d 97, 103 (2d Cir. 1990).

Negative inferences have been used in civil forfeiture cases. *United States v. 900 Rio Vista Blvd.*, 803 F.2d 625, 627 n.4 (11th Cir. 1986); see *Avirgan v. Hull*, 932 F.2d 1572, 1580 (11th Cir. 1991) (holding that negative inference does not substitute for evidence needed to meet burden of production), *cert. denied*, 112 S. Ct. 913 (1992).

Accordingly, a growing number of courts have recognized that the protection of claimants' Fifth Amendment rights warrants a stay of civil forfeiture proceedings; for example, one court, while noting that there is no constitutional right to a stay, determined that courts retain discretion to stay civil forfeiture proceedings to spare claimants from making a "Hobson's choice."⁴⁸ The Second Circuit, although not deciding the issue, stated that "[t]he permissibility of an adverse inference from a claim of Fifth Amendment privilege in a civil forfeiture proceeding involving a home, especially during the pendency of parallel criminal charges, poses a troubling question, given the severity of the deprivation at risk."⁴⁹ More recently, the Second Circuit has, in dicta, urged district courts to "stay civil forfeiture proceedings pending the completion of related criminal proceedings."⁵⁰

Thus, the imposition of an automatic stay would protect claimants from ceding one constitutional right in order to assert another.⁵¹ This would, in turn, deny the government the tactical benefit of compelling claimants to respond to civil discovery requests during the pendency of parallel criminal proceedings.⁵² It can be argued that a stay under these circumstances would ultimately encourage perjury by claimants. As noted above, however, imposing an automatic stay would allow the government to file civil forfeiture proceedings without jeopardizing criminal investi-

⁴⁸ *United States v. 1344 Ridge Rd.*, 751 F. Supp. 1060, 1061-62 (E.D.N.Y. 1989).

⁴⁹ *15 Black Ledge Drive*, 897 F.2d at 103 (citation omitted).

⁵⁰ *United States v. Statewide Auto Parts*, 971 F.2d 896, 905 (2d Cir. 1992) (recommending that district courts exercise discretion "absent some sort of extraordinary situation").

⁵¹ See *United States v. United States Currency*, 626 F.2d 11, 17 (6th Cir.) (vacating district court's order dismissing forfeiture proceedings), *cert. denied*, 449 U.S. 993 (1980). The court recognized that claimants should not be compelled to choose between the exercise of their Fifth Amendment privilege and property subject to a forfeiture proceeding. *Id.* at 15. Conversely, the government should not be compelled to forego the forfeiture remedy authorized by Congress in its enactment of 18 U.S.C. § 981. *Id.* The court noted that there were several devices available to prevent the collision of these rights, including a stay of the forfeiture proceeding. *Id.* at 17 ("The court might also choose to stay the forfeiture proceedings until the completion of any criminal prosecutions . . ."); see *1344 Ridge Rd.*, 751 F. Supp. at 1062 n.1 (citing cases holding unconstitutional compulsory choice between two constitutional rights).

⁵² See FED. R. Civ. P. Supp. Rule C(6) (requiring claimants to respond to government interrogatories at time of answering complaint). Due to the absence in civil forfeiture proceedings of the protections afforded criminal defendants, including court-approved discovery and a high burden of proof, one court has expressed concern that "the forfeiture statute is being used . . . as a substitute—or perhaps as a dry run—for a criminal prosecution." *Statewide*, 971 F.2d at 903.

gations and proceedings, resulting in substantial benefits to the government.

III. MECHANICS OF AN AUTOMATIC STAY

A. *Enactment*

An automatic stay provision could be enacted in a number of ways. First, Congress could amend title 18, section 981(g) and title 21, section 881(i) to expand the statutory stay and implement an automatic stay provision in its place.⁵³ Although several civil forfeiture reform bills have been introduced in Congress, few of these proposals would amend the existing stay provisions.⁵⁴ Second, the Federal Rules of Civil Procedure or the Supplemental Rules for Certain Admiralty and Maritime Proceedings ("Supplemental Rules"), which govern civil forfeiture proceedings,⁵⁵ could be amended to provide for a stay.⁵⁶ Finally, and most importantly, district courts could enact an automatic stay provision for civil forfeiture proceedings as part of their court's local rules.⁵⁷ Such a rule could be grounded on a court's inherent discretion to

⁵³ Significantly, Congress has provided that in actions involving the forfeiture of imported immoral articles, "[u]pon motion of the United States, a court shall stay . . . civil forfeiture proceedings . . . pending the completion of any related criminal matter." 19 U.S.C. § 1305(d) (1988). This section is substantially broader than the provisions of 18 U.S.C. § 981 and 21 U.S.C. § 881. However, this section still conditions stays upon an application of the government, and still requires resolution of a motion. In drafting an automatic stay provision, legislators can obtain guidance from the automatic stay provision of the Bankruptcy Code. *See, e.g.*, 11 U.S.C. § 362(a) (1988) (providing protective stay of broad range of acts against debtor, debtor's property, or debtor's estate).

⁵⁴ Several pending bills make no provision for staying forfeiture actions, *see* 1993 H.R. 2417, 3347, while the National Conference of Commissioners on Uniform State Laws draft proposal relies on the "good cause" language of the present provisions, and limits the stay to the period "during a criminal trial of a related indictment or information." NCCUSL Draft, Amendments to Uniform Controlled Substances Act, Article V, § 517(d).

⁵⁵ Fed. R. Civ. P. Supp. Rule A. The Supplemental Rules for Certain Admiralty and Maritime Claims apply to "the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not." *Id.*

⁵⁶ *See* ABA Report 108B, *supra* note 31, at 8 (recommending amendment of Federal Rules of Civil Procedure to create "a rebuttable presumption in favor of a complete stay of parallel civil proceedings").

⁵⁷ District courts have broad power to enact local rules, as long as they are not inconsistent with the Federal Rules of Civil Procedure. 28 U.S.C. § 2071(a); Fed. R. Civ. P. 83; *Somlyo v. J. Lu-Rob Enter.*, 932 F.2d 1043, 1046 (2d Cir. 1991) (noting that local rules have force of law); *Holloway v. Lockhart*, 813 F.2d 874, 880 (8th Cir. 1987); *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983).

stay proceedings.⁵⁸ Amendment of local rules would permit those courts most affected by the flood of civil forfeiture litigation to enact an automatic stay provision quickly and with relative ease.⁵⁹

B. Procedure

In order to conserve judicial resources, a stay of civil forfeiture proceedings should be imposed automatically without the need for a motion. Unlike the bankruptcy context in which the filing of a petition triggers the automatic stay, however,⁶⁰ no singular event in forfeiture proceedings provides a definitive basis for imposing a stay. While a stay could be triggered upon the filing of an indictment or information, this procedure would not provide the necessary safeguards during the pendency of criminal investigations or grand jury proceedings. Additionally, under certain circumstances the parties may wish to proceed with civil forfeiture actions, notwithstanding a pending investigation or prosecution.⁶¹

Accordingly, an automatic stay could best be implemented by the filing of a notice by any party to a civil forfeiture proceeding. The notice would merely have to certify that the civil proceedings should be stayed due to an ongoing investigation or prosecution or, in the case of a claimant, due to a good faith belief that there is a related investigation. The filing of such a notice would automatically stay all proceedings in the action for a specific period of time. Notices filed in federal civil proceedings are, of course, subject to Rule 11 of the Federal Rules of Civil Procedure,⁶² which

⁵⁸ Of course, as noted above, in *In re Ramu Corp.*, the Fifth Circuit held that this inherent discretion was circumscribed by the statutory stay provisions. *In re Ramu Corp.*, 903 F.2d 312, 318-19 (5th Cir. 1990); see *supra* notes 23-31 and accompanying text. However, a number of other courts have held that district courts retain the discretion to stay civil forfeiture proceedings. See, e.g., *Statewide*, 971 F.2d at 905; *Afro-Leron, Inc. v. United States*, 820 F.2d 1198, 1202 (D.C. Cir. 1987); *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980); *United States v. 1344 Ridge Rd.*, 751 F. Supp. 1060, 1062 (E.D.N.Y. 1989).

⁵⁹ For example, in 1992, the following districts had more than 300 civil forfeiture cases pending: Central District of California (529), Southern District of Florida (449), Southern District of California (387), and Eastern District of New York (317). See *Civil Caseload Statistics of Asset Forfeitures by District*, Aug. 31, 1992.

⁶⁰ See 11 U.S.C. § 362(a) (1988).

⁶¹ See *Shaffer v. United States*, 528 F.2d 920, 922 (4th Cir. 1975) (setting forth procedure allowing parties to proceed in tax refund actions when taxpayer granted use immunity).

⁶² FED. R. CIV. P. 11. Rule 11 provides that, by his signature on a pleading, motion, or other paper, an attorney certifies that: he has read the paper; to the best of his knowledge, the paper is well grounded in fact and law; and that the pleading, motion, or other paper is not interposed for any improper purpose. *Id.* A violation of the rule

provides for sanctions in the case of an improper filing. The availability of an automatic stay would allow the government to protect criminal investigations and prosecutions without disclosing sensitive information, and would prevent claimants from facing a Hobson's choice presented by the negative inference in later proceedings. Moreover, in cases in which all parties are willing to proceed in spite of parallel criminal proceedings, the automatic stay need not be imposed.⁶³

C. Possession of the Defendant's Property During the Stay

As a general matter, forfeiture proceedings are commenced by the seizure of property subject to a forfeiture action.⁶⁴ Until recently, the government had virtually unfettered discretion to seize property on an *ex parte* basis.⁶⁵ However, during the past several years, courts have cut back on the government's right to seize property without notice pursuant to the Supplemental Rules. The Supreme Court, for example, has held that the Due Process Clause prohibits the government from seizing real property without notice or an opportunity to be heard.⁶⁶ In such cases, the government may commence the action and protect its interest by filing a complaint and a notice of pendency against the real property.⁶⁷ The Second Circuit has recently stated, in dicta, that similar protections, notice and an opportunity to be heard, should be extended to ongoing businesses.⁶⁸ The government retains the

allows the court, in its discretion, to impose sanctions, including striking the offensive paper, and the payment of the adversary's expenses. *Id.*

⁶³ In such a situation, the court may lose the benefit of the collateral estoppel effect of completing criminal proceedings prior to resolving the forfeiture action. *See* *United States v. 89 Firearms*, 465 U.S. 354, 362 (1984). Courts could, however, retain the discretion to impose a stay *sua sponte*.

⁶⁴ *See* 18 U.S.C. § 981(b)(2) (1988).

⁶⁵ *FED. R. Crv. P. Supp. Rule C(4)* (requiring no notice other than execution of process). It is settled that "[t]he rationale underlying [the] limited notice [of Supplemental Rule C(4)] is that 'seizure of [property] alone will result in prompt, actual notice to all interested parties without the necessity of formal personal notice.'" *United States v. \$51,680 in U.S. Currency*, 1985 WL 2727 (N.D. Ill. 1985) (quoting *The Mary*, 13 U.S. (9 Cranch) 126 (1815)); *accord* *Wong Shing v. M/V Mardina Trader*, 564 F.2d 1183 (5th Cir. 1977) (upholding procedure of Supplemental Rule C(4)).

⁶⁶ *See, e.g., United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 500-01 (1993); *United States v. 4492 South Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989).

⁶⁷ *James Daniel Good*, 114 S. Ct. at 500-02; *4492 South Livonia Rd.*, 897 F.2d at 661.

⁶⁸ *United States v. Statewide Auto Parts*, 971 F.2d 896, 901 (2d Cir. 1990) (concluding that *ex parte* seizures "effectively shut[] down an ongoing business" and can be avoided by utilizing other means).

right to seize conveyances⁶⁹ and funds,⁷⁰ and retain such property pendente lite in order to prevent waste or removal of property subject to forfeiture.

These rules can also govern possession of the defendant's property during the pendency of the stay; for example, in the case of funds or conveyances, the government would retain possession of the property while the proceedings are stayed. In the case of real property, the claimant would maintain possession of the property during the stay, unless the government was willing to submit to a hearing.⁷¹

D. Duration of a Stay

A stay, naturally, cannot be of indefinite duration.⁷² A lengthy stay can impose a severe hardship on forfeiture claimants,⁷³ particularly when the government is in possession of the claimant's property.⁷⁴ Moreover, there are circumstances under which an indefinite stay is impractical, such as where the criminal defendant is a fugitive.⁷⁵

⁶⁹ See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *Statewide*, 971 F.2d at 905.

⁷⁰ See *United States v. Daccarett*, 6 F.3d 37, 49 (2d Cir. 1993) (upholding seizure of wire transfers); *United States v. \$8850*, 461 U.S. 555, 562 (1983) (upholding seizure of money for failure to make proper declaration upon entering country).

⁷¹ In many cases, where there are pending criminal proceedings, the evidence needed to conduct such a hearing could compromise an investigation or prosecution. However, since the government's burden is only probable cause, which can be established through hearsay, there may be cases in which the government may proceed with a hearing without jeopardizing the criminal case. See, e.g., *United States v. Puello*, 814 F. Supp. 1155 (E.D.N.Y. 1993). Moreover, an opportunity to be heard does not necessarily require the government to submit to a hearing; the government's burden can be met through the use of affidavits. *Statewide*, 971 F.2d at 905.

⁷² *In re Ramu Corp.*, 903 F.2d 312, 318 (5th Cir. 1990) (holding that stay of forfeiture proceeding may not be of "indefinite duration"); *United States v. Banco Cafetero*, 107 F.R.D. 361, 366 (S.D.N.Y. 1985), *aff'd*, 797 F.2d 1154 (2d Cir. 1986).

⁷³ See *\$8850*, 461 U.S. at 565 ("Being deprived of this substantial sum of money for a year and a half is undoubtedly a significant burden."); *United States v. All Funds on Deposit*, 801 F. Supp. 984, 989 (E.D.N.Y. 1992) ("[T]he loss of use of the seized funds for months or years while the case drags on can cripple a business."), *aff'd sub nom. United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993).

⁷⁴ The effect of deprivation of property during the pendency of the stay can be mitigated in many cases by allowing the claimant to post a bond or other security to regain possession of the property. See generally *FED. R. Crv. P. Supp. Rule E(5)* (providing for release of property upon posting bond).

⁷⁵ See, e.g., *United States v. Funds Held in the Name of John Hugh Wetterer*, 138 F.R.D. 356, 361-62 (E.D.N.Y. 1991) (where defendant is fugitive "it can not be predicted when the civil forfeiture proceeding will continue if an indefinite stay is granted").

Therefore, an automatic stay should be of limited duration. In light of the requirements of the Speedy Trial Act,⁷⁶ such a stay could logically be limited to a six-month period, subject to renewal at the end of the period.⁷⁷ Most criminal proceedings should be completed during the six-month period.⁷⁸ If the proceedings are not completed, the government or the claimant could apply for an extension of the stay. For the reasons set forth above, courts should grant such extensions liberally, subject only to the consideration of the hardships imposed on the claimants.

CONCLUSION

By encompassing mandatory stay provisions in the civil forfeiture statutes found in titles 18 and 21 of the United States Code, Congress recognized the governmental interest in protection of criminal prosecutions from broad civil discovery. The need for staying civil forfeiture actions pending the resolution of related criminal proceedings has been heightened by several factors, including increasing numbers of such actions, growing concern for the rights of claimants, and broader application of constitutional protections. Unfortunately, judicial interpretation of the extant provisions has limited the discretion of courts in the imposition of a stay and rendered the process unnecessarily burdensome. Given the volume of civil forfeiture litigation and the ephemeral nature of applicable law, the institution of an automatic stay provision would reduce the burden on courts while protecting the rights of the government and claimants.

⁷⁶ 18 U.S.C. §§ 3161-3175 (1988).

⁷⁷ See *Funds in Name of Wetterer*, 138 F.R.D. at 362.

⁷⁸ See 18 U.S.C. §§ 3161-3175. The Speedy Trial Act requires the commencement of a criminal trial within 60 days of arraignment or indictment. *Id.* § 3161(c).

